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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LAPP,

Defendant and Appellant.

C060335

(Super. Ct. No.  
08F02387)

At the trial readiness conference, the parties announced a plea bargain in which defendant Michael Lapp would enter a plea of no contest to a charge of penetrating the genital opening of an adult incapable of giving consent because of a disability or disorder. (Pen. Code, § 289 [undesigned section references will be to this code].) In exchange, the trial court would consider defendant's suitability for probation, and there would be a sentence lid of the lower term of three years in prison (along with the dismissal of the other three charges). The trial court subsequently denied probation and imposed the agreed three-year term. Defendant filed a notice of appeal and

requested a certificate of probable cause, which the trial court granted.

On appeal, defendant argues that the court improperly denied his request at sentencing for an evaluation pursuant to sections 1203.067 and 1203.03, which was in derogation of the implied term of his plea bargain that the court give meaningful consideration to granting probation. He also argues that the court abused its discretion in denying probation based on the facts actually before it. We shall affirm.

#### FACTS

##### *I. Preliminary Hearing*

According to the testimony at the preliminary hearing, the victim (born in July 1989) was defendant's natural daughter, who had lived in foster care since the age of 11. From age 11 to the time she turned 18, she had not seen defendant because of his status as a registered sex offender. She is self-described as having "mild retardation," and was living in a mentor home under the auspices of the Alta California Regional Center in a program helping her to learn to live independently. Her main detriment is an inability to learn effectively in an academic setting. Defendant does not dispute his awareness of her condition.

On turning 18, the victim decided she wanted to have contact with her father, and began having overnight visits at the apartment he shared with his girlfriend. In February 2008, on the night in question, she had been sleeping on the floor next to her father, both of them wrapped in their own blankets;

the girlfriend was sleeping in the bed next to them. She awakened to discover defendant on top of her with his fingers inside her vagina. He initially ignored her protest, then rolled off her after 10-15 seconds and said that he had not known what he was doing. He apologized, then fell back asleep. The next morning, he acted as if nothing had happened.

## *II. Probation Report*

According to the probation report, the police had the victim place a pretext phone call to defendant. He refuted the victim's claim that anything had happened, but added that if it had, he was sorry and it would not happen again. In a direct interview with the police, defendant said that he had been drinking that day and did not recall any such incident taking place, but again asserted that he was sorry if anything had happened and there would not be any recurrence. He also claimed that the victim had acted in a sexually provocative manner during her visits, for which reason he had told her that she could not stay with them any longer. The girlfriend told the police that she thought this restriction had angered the victim. Defendant continued to deny culpability when the probation officer interviewed him in jail.

The victim reported the need for counseling after the incident, her distress stemming not only from this breach of trust on the part of her father but also from reliving her uncle sexually assaulting her at 13. However, her mentor stated that she was "back to being herself" by the time of the probation

report. She was satisfied that her father had accepted responsibility for his actions.

In 1993, defendant entered a plea of no contest to a charge of sexual battery after sodomizing his girlfriend in the shower against her will. The court placed him on probation, and he apparently successfully completed his term. In 2000, he entered a plea of no contest to a charge of failing to register as a sex offender. The court placed him on probation, and he again apparently completed his probationary term successfully.

Defendant failed to complete high school or get an equivalency degree because he was uninterested in education. He has not been employed since 1999, receiving disability and social security benefits. He had two children with the victim of the 1993 sexual battery, for whom he had the child-rearing responsibilities (because the mother was unable to care for them) until their placement into foster care in the home of his mother and then his aunt. The probation report purported to evaluate defendant under the "Static-99" criteria and determined that he scored in the moderate to low level for recidivism.

With respect to probation, the report noted that defendant would be eligible if he satisfied the criteria of section 1203.067,<sup>1</sup> and mentioned the fact that he was remorseful.

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<sup>1</sup> These include an evaluation pursuant to section 1203.03 at a Department of Corrections diagnostic facility or the probation department; a hearing on whether defendant poses a threat to the victim; and a psychological evaluation pursuant to section 288.1 that also includes an assessment of whether defendant poses a threat to the victim, as well as whether

However, it did not recommend probation because defendant's criminal record was significant. With respect to sentencing, it stated that he took advantage of a position of trust and his prior convictions were numerous.<sup>2</sup> It did not find any other factors in mitigation.

### III

At the sentencing hearing, defense counsel pointed out a few inaccuracies in the probation report (none of which are material to this appeal). He then argued that the report failed to consider defendant's inebriation at the time of the offense as a mitigating factor, and debated the characterization of the two felony convictions as being either "numerous" or recent (also disputing the existence of the trespassing convictions). He further faulted the report for failing to note defendant's successful completion of probation for the two convictions as a factor in favor of probation. Defense counsel also highlighted the Static-99 finding of a low risk of recidivism. Finally, even though a section 288.1 evaluation was not required, defense counsel believed it would provide useful information for the court.<sup>3</sup>

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defendant would benefit from treatment. (The probation report recognized that a section 288.1 evaluation was inapplicable because the victim was over the age of 14.)

<sup>2</sup> In addition to the two felony convictions, defendant had misdemeanor convictions for trespassing on railroad property and posted land, as well as a juvenile adjudication for residential burglary.

<sup>3</sup> Thus, the record does not reflect defense counsel raising the issue of a section 1203.03 diagnostic evaluation. We will reach

The court responded that it did not need to obtain any evaluations unless it first believed that probation was an appropriate disposition, which it did not. "[F]rankly, the Court believes there are other factors to deny probation, such as the nature and seriousness and circumstances of the crime, the vulnerability of the victim, the . . . position of trust . . . , and the fact that the priors . . . are a sexual battery by force . . . and a failure to register as a sexual offender . . . . There is a pattern of conduct by Mr. Lapp that is sexually oriented that makes him not a probation candidate. [¶] So I, notwithstanding probation's report, believe there are plenty of other factors by which the Court would deny probation and is going to deny probation." The court reiterated these factors in its formal rendition of judgment.

#### DISCUSSION

##### *I*

Defendant contends, "The terms of appellant's plea bargain required the court to order a Penal Code section 1203.03 diagnostic evaluation before deciding whether to grant or deny probation."

This argument is without merit. It is true that a defendant convicted of violating section 289 must comply with the requirements of section 1203.067 (see fn. 1, *ante*), including a section 1203.03 diagnostic evaluation, before

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this appellate contention despite the apparent forfeiture, as it is easily dispatched.

the court may grant probation. This does not mean, however, that the court must *first* review an evaluation before deciding whether a defendant is even a candidate for probation.

In *People v. Ramirez* (2006) 143 Cal.App.4th 1512, the defendant made the identical argument. (*Id.* at pp. 1530, 1531-1532.) *Ramirez* succinctly dispatched it: "A section 1203.067 diagnostic evaluation becomes necessary *only if, after weighing the criteria listed in rule 4.414*, a court is *inclined* to order probation rather than prison time. When the court has no intention of granting probation, and the record adequately supports such a determination, there is no need for a section 1203.067 diagnostic evaluation." (*Id.* at p. 1532, italics added.)

Defendant attempts to avoid this rule. He asserts that an objective evaluation of his reasonable beliefs regarding the scope of his bargain leads to a conclusion that an implied term was the court's consideration of a section 1203.03 evaluation *before* it made a decision about probation. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 345; *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1069.)

Defendant's primary reliance on *Toscano* is misplaced. *Toscano* does not involve a section 1203.03 evaluation. There, the parties *explicitly* included in a *written* agreement the defendant's entitlement to litigate both the constitutional validity of his waiver of rights in his prior conviction (e.g., *People v. Sumstine* (1984) 36 Cal.3d 909) and his entitlement to an exercise of the court's discretion to strike the conviction

in the interests of justice (§ 1385). (*Toscano, supra*, 124 Cal.App.4th at p. 342.) However, the sentencing judge--confronted with a substitute prosecutor who had misinterpreted the scope of the bargain and was unprepared to litigate the *Sumstine* challenge (based on a shorthand oral representation of the original prosecutor at the plea hearing)--found the terms ambiguous and afforded the defendant only the choice between withdrawing his plea or forfeiting his *Sumstine* challenge; the defendant chose the latter reluctantly. (*Toscano, supra*, at pp. 343-344.) *Toscano* did not find anything ambiguous about the plea agreement; alternatively, if there were indeed a conflict between the written agreement and the oral representation, the defendant was entitled to enforce the favorable interpretation. (*Id.* at pp. 344-345.)

Unlike *Toscano*, we do not find any express provision for the court's consideration of a section 1203.03 evaluation before ruling on probation, and defendant does not present any cogent reason why such a term is necessarily implied. That it may have been useful in deciding whether he would benefit from the treatment program mandated as a condition of probation (see § 1203.067, subd.(b)) simply begs the question of whether the court was even inclined to grant probation. We also disagree that the passage of time since his prior convictions makes the diagnostic report akin to a supplemental probation report (especially considering that there was a current probation report at the time of his present sentencing). Nor, for that matter, was it essential for the court to be familiar with



anything beyond the facts of the present offense and the criminal history of defendant in resolving the threshold question of entitlement to probation. As a result, nothing about his plea bargain required the court to consider any sort of diagnostic evaluation before denying his request for probation.

## II

This leaves defendant's argument that the court abused its broad discretion in determining his suitability for a grant of probation (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1256-1257), which requires him to show that a grant of probation was the only reasonable decision (Cf. *People v. Carmony* (2004) 33 Cal.4th 367, 376-377). He essentially rehashes trial counsel's arguments at sentencing, and asserts that "several material inaccuracies . . . appeared to influence the court's decision" without either identifying them or demonstrating the role they played in the court's analysis (for which reason we do not consider this claim any further. (*People v. Oates* (2004) 32 Cal.4th 1048, 1068, fn. 10).) Finally, he argues that vulnerability and abuse of a position of trust are inherent in the offense.

We will not belabor the issue. Although disabled victims are to a certain extent all "vulnerable," the present case is particularly egregious in that the victim found herself in defendant's own bedroom by virtue of her desire to reacquaint with him after an absence of seven years, and therefore she was significantly more vulnerable (in terms of her emotions and the

location where the crime took place) than the bare minimum required to commit the crime. Nor, for that matter, is a position of trust inherent in the crime; a stranger can commit it just as well. Fifteen years after showing an inability to control his sexual impulses in assaulting the victim's mother and sending the victim into foster care with her paternal relatives (which led to a previous molestation), defendant is still apparently a slave to his urges of the moment regardless of their inappropriateness. The court was entitled to give greater weight to these factors than defendant's successful completion of previous probationary terms, or the age or infrequency of his previous convictions. The trial court did not abuse its discretion in denying probation.

DISPOSITION

The judgment is affirmed.

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SIMS, J.

We concur:

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BLEASE, Acting P. J.

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NICHOLSON, J.